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Reply Bx. of Simrall for A

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JAMES

Filed Aug 15, 1894.

SUPREME COURT OF THE UNITED STATES

JOHN T. POWERS,

Plaintiff in Error.

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant in Error.

Reply to Brief of Plaintiff in Error on Motion to Dismiss
Writ of Error.

The only part of the brief of the plaintiff in error that we deem it necessary to notice is the concluding part, which states that the petition for removal was defective, because it did not show the citizenship of either Boyer, Hickey or Evans, and indeed did not mention the name of Boyer.

This question was considered by the Circuit Court, and we can not present a stronger argument than the reply of the Circuit Court to the objection.

"But it is said that the petition for removal is defective, in that it does not aver that Boyer was fraudulently joined as a defendant and subsequently dismissed.

The petition for removal stated the necessary jurisdictional facts, namely, the diverse citizenship, the jurisdiction, amount, and averred that removal within statutory time had been prevented by fraud of plaintiff. It is true that in mentioning the names of defendants who were al-

leged to have been joined fraudulently in order to defeat the jurisdiction of the federal court and to have been dismissed after serving this purpose, Boyer was by an evident mistake omitted, but this was merely an omission to state all the evidential facts on which the claim of fraudulent estoppel was based, but it did not destroy the legal sufficiency of the petition to show an estoppel. It is settled beyond controversy that it is not for the state courts to pass upon the facts involved in the averments of a petition for removal. It can only deny an application to remove when, as a matter of law on the face of the petition and facts disclosed by the record, the right does not exist.

Kansas City, Ft. Scott & Memphis R. R. Co. v. Daughtry, 138 U. S., 298; Crehore v. Ohio & Mississippi Ry. Co., 131 U. S., 240; Burlington, Cedar Rapids, etc., Railway v. Dunn, 122 U. S., 513; Carson v. Hyatt, 118 U. S., 279.

An examination of the record in this case would have shown the joinder of Evans, Hickey and Boyer, the averment in the first petition for removal that they had all been fraudulently joined to defeat removal, and their subsequent dismissal from the case. This is a case, therefore, where an amendment to the petition for removal can be permitted in this court to state more fully and exactly all the facts upon which the removal was prayed, because the ultimate jurisdictional facts are correctly stated, and the detailed facts concerning the fraud, though imperfectly stated in the petition for removal, all appear in the record. Carson v. Dunham, 121 U. S., 421, 427; Ayers v. Watson, 113 U. S., 594, 598; Crehore v. Ohio & Mississippi R. R. Co., 131 U. S., 240; Jackson v. Allen, 132 U. S., 27; Martin's Adm'r v. Baltimore & Ohio R. R., 151 U. S., 673, 691. It is true, also, that there is in the petition no direct statement that the reason why the joinder of Hickey and Boyer defeated the jurisdiction of the federal court was, because they were citizens of the same state as the

plaintiff, though this is a necessary inference from the averments made; but it does appear from the ruling of this court on the first petition for removal, which was made a part of the record in the state court, that it was then admitted by both plaintiff and defendant that Boyer and Hickey were citizens of Kentucky, and that for this reason the motion to remand was granted. Defendant has been given leave to amend its petition for removal to restate the facts as above suggested and an amended petition has been filed." (Record, pp. 46, 47.)

The amendment permitted by the court was filed (see Rec., page 29), and shows that by pure clerical error of the draftsman the name of Evans was substituted for Boyer, thus causing Boyer's name not to appear in the petition for removal. It certainly was not error to permit the correction of such a mistake.

Respectfully submitted,

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Attorney for Defendant in Error.